

U.S. INSTITUTE FOR ENVIRONMENTAL CONFLICT RESOLUTION

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INSTITUTE DIRECTOR

October 31, 2000

Jeffrey M. Senger, Esq.
Deputy Senior Counsel for Dispute Resolution
U.S. Department of Justice
950 Pennsylvania Avenue, N.W., Room 4328
Washington, D.C. 20530

Re Comment regarding two documents: "Confidentiality in Federal ADR Programs" and
"Evaluation of Federal ADR Programs"

Dear Mr. Senger:

This letter sets forth the comments of the U.S. Institute for Environmental Conflict Resolution, on behalf of itself and its parent agency, the Morris K. Udall Foundation, regarding the above-referenced documents. These comments are submitted for consideration of the Federal ADR Council pursuant to the request for comments dated September 27, 2000.

Background

The U.S. Institute for Environmental Conflict Resolution (the "Institute") was created by Congress as a program of the Morris K. Udall Foundation (the "Foundation") in 1998. The Foundation is an independent agency of the executive branch of the United States government. Congress charged the Institute with providing assessment, mediation, training and other related services to resolve environmental disputes involving the federal government. In order to fulfill its mandate, the Institute provides services as a neutral in relation to "dispute resolution proceedings," as defined by the Administrative Dispute Resolution Act of 1996 ("ADRA"). Therefore, the proposed guidance set forth in "Confidentiality in Federal ADR Programs" will have an impact on the Institute and its work as a neutral in federal environmental disputes. Similarly, the document "Evaluation of Federal ADR Programs" is applicable to evaluation of the Institute's program.

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Confidentiality in Federal ADR Programs

The Institute recognizes the importance of providing guidance to neutrals and parties involved in federal ADR proceedings regarding the confidentiality provisions of ADRA. We wish to express our appreciation for the work of the Federal ADR Steering Committee in preparing the section-by-section analysis of ADRA and the draft "Model Confidentiality Statement for Use by Neutrals."

We do have concerns, however, primarily about the proposed "Model Confidentiality Statement" and believe that, at a minimum, it requires much more discussion before being finalized. We understand that it has been difficult for large organizations, such as the American Bar Association, the American Arbitration Association, and the Conflict Resolution Association to review the guidance and prepare substantive comments in the short comment period that was provided. It may also have been difficult for many federal agencies to prepare substantive comments within 30 days.

We urge the Federal ADR Council not to finalize the guidance or Model Statement until a wide range of viewpoints can be considered, including those of private sector organizations whose members provide services as neutrals in federal dispute resolution proceedings. We believe that a wider range of perspectives on federal ADR is necessary to clarify whether and how the Model Statement needs to be adapted for different types of ADR.

In addition, the Institute suggests that rather than having one Model Statement for all federal ADR programs, it might be preferable to provide guidance on the issues to be covered in a confidentiality statement and encourage each ADR program to draft its own statement adapted to its services and subject area.

The issues of concern to the Institute include the following:

1. The Model Confidentiality Statement may not be appropriate for all settings. The guidance document seems to presume that the Model Confidentiality Statement is suitable for use in all types of federal ADR proceedings. The Institute does not believe, however, that the Model Statement would be appropriate for the broad range of neutral services it provides – including intake, conflict assessments, process designs, facilitation and mediation.

For example, the guidance broadly (and we believe appropriately) defines the term "neutral" to include:

... anyone who functions specifically to aid the parties during a dispute resolution process There may be more than one neutral during the

course of a dispute resolution process (e.g., an 'intake' neutral, a 'convenor' neutral, as well as the neutral who facilitates a face-to-face proceeding).

See Answer to Question 5: "Who is a neutral?"

The Institute agrees that the broad range of neutrals should be considered "neutrals" for purposes of the confidentiality protections of ADRA. But the Model Statement appears inappropriate for use at the "intake" stage of a conflict resolution process. Similarly, the Model Statement may not be appropriate for use in the convening or conflict assessment work in which the Institute frequently is involved. But the neutral "convening" parties or assessing a conflict should be considered a "neutral" under ADRA and protected by its confidentiality provision.

2. The Model Statement may not be appropriate for neutrals who are not employed by the federal government.

Portions of the Model Statement address the risk of disclosure of confidential communications through the Freedom of Information Act or under statutes governing fraud, waste and abuse. Those statutes may not apply to private sector neutrals providing contracted services in federal ADR proceedings (although they may apply to one or more parties in such proceedings).

3. The importance of confidentiality to effective mediation and other ADR processes should be emphasized.

While the guidance acknowledges the importance of confidentiality in federal ADR proceedings (see, e.g., the Supplementary Information section of the Notice), overall it seems to emphasize the exceptions to confidentiality protection. The Institute is aware that there are unresolved questions, such as the interplay of ADRA's confidentiality provisions and the various inspector general acts. Nonetheless, the Institute urges the Federal ADR Council to give more emphasis to the importance of confidentiality in Federal ADR and to take a broad reading of the protections set forth in ADRA. We also urge the federal ADR Council and Steering Committee to continue efforts to obtain concurrence from other organizations, such as the President's Council on Integrity and Efficiency, regarding confidentiality protections.

4. What effect, if any, will the guidance or the Model Statement have on confidentiality protections?

While the guidance apparently will not be adopted as a regulation or otherwise become mandatory for federal agencies, it probably will be accorded deference as an interpretation of ADRA. The Institute would therefore hope for more discussion of the possible consequences of the guidance – such as whether it will be viewed as defining what the reasonable expectations of the parties should be or establishing a standard for disclosure by neutrals regarding risks to confidentiality.

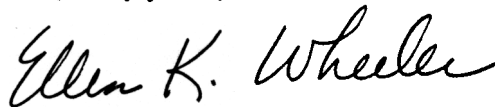
In summary, the Institute urges the Federal ADR Council to refrain from finalizing the guidance and the Model Statement so that their implications may be fully considered and to allow for substantive comment from all viewpoints, including those of private sector providers.

Evaluation of Federal ADR Programs

The program evaluation recommendations appear to provide useful guidance for agencies developing evaluation procedures. The Institute has been involved in designing an evaluation system for its conflict resolution services, and the recommendations set forth in the guidance are generally consistent with what the Institute has been doing. We do not have any other comments on the evaluation recommendations.

Thank you for your attention to our comments.

Very truly yours,

A handwritten signature in black ink that reads "Ellen K. Wheeler". The signature is written in a cursive, flowing style.

Ellen K. Wheeler
General Counsel